

Defining Terrorism:
An Urgent Task for the Shipping
Industry



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Acronyms

AIS: Automatic Identification System.

BIMCO: Baltic & International Maritime Council.

CSI: Container Safety Initiative.

CTPAT: Customs - Trade Partnership Against Terrorism.

GA: General Assembly of the United Nations.

ILC: International Law Commission.

IMCO: International Maritime Consultative Organization.

IMO: International Maritime Organization.

ISM Code: International Safety Management Code.

ISPS Code: International Code for the Security of Ships and Port Facilities.

ISSC: International Ship Security Certificate.

MSC: Marine Safety Committee.

OECD: Organization for Economic Co-operation and Development.

OIC: Organization of the Islamic Conference.

PFSAS: Port Facility Security Assessment Survey.

PFSO: Port Facility Chief Security Officer.

PFSP: Port Facility Security Plan.

SC: Security Council of the United Nations.

SOLAS Convention: International Convention for the Safety of Life at Sea.

SSAS: Ship Security Assessment Survey.

SSO: Ship Security Officers.

SSP: Ship Security Plan.

SUA Convention: Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation.

TBP: Terrorism Prevention Branch.

UNCTAD: United Nations Conference on Trade and Development.

UNODC: United Nations Office on Drugs and Crimes.

1. Introduction

Until the end of the 1980s security issues in the maritime sector were not covered by specific international conventions as a unique regime or agreement. They were kept to national regulations and limited bilateral agreements.

The exploitation of the seas for human trade and for transport of illegal drugs, weapons and endangered species has grown exponentially during the past 20 years. These illegal activities have a negative impact on the shipping industry and port facilities. From isolated acts of piracy, crime has evolved to become extremely well prepared activities by organized crime. Recently, the maritime industry has also been affected by international terrorist activities.

Traditionally, port facilities were not regulated by the International Maritime Organization –IMO- with the exception of the interaction of ships with port facilities. However, according to the International Maritime Bureau, most pirate attacks occur while ships are at anchor or at berth. This has led the IMO to develop a series of recommendations, directives, and resolutions aimed at improving port facilities' safety and security measures.

The attacks of September 11 have affected and changed the strategy to address crime and terrorism, including the development of wider and stronger security measures, ranging from technology to regulations.

1.1. Presentation

The main objective of this report is to discuss what is being done at the multilateral level to prevent and reduce the risk of a terrorist attack in a very specific but highly important sector of the global economy –the shipping industry. In addition, the issue of State responsibility will be addressed, highlighting the consequences of the non-compliance of the ISPS Code by member States to the International Convention for

the Safety of Life at Sea, -SOLAS Convention. I will also discuss two unilateral measures taken by the government of the United States to address similar issues.

This thesis will focus on Chapter XI-2 of the 1974 SOLAS Convention that includes the International Code for the Security of Ship and Port Facilities –ISPS Code.

I will also demonstrate that the ISPS Code should be, at least in theory, a practical guide to reduce security breaches and prevent terrorists from attacking ships or port facilities, or from using them as an instrument to carry out their attacks.

1.2. Structure of the thesis

There are 7 chapters comprising this report. The reader, in order to understand the underpinning of the ISPS Code, will have a discussion on the definition of terrorism and a brief explanation of the importance of maritime transport for the global economy.

Further there will be an overview of the evolution of the SOLAS Convention from 1912 to 1974 and also the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation –SUA Convention -which are the two most important international treaties dealing with safety and security at sea.

The focus of the thesis will be on the elements of chapter XI-2 of the SOLAS Convention entitled International Code for the Security of Ships and of Port Facilities –ISPS Code, its background, implementation and the cost of non compliance.

Finally, I will address some important legal issues arising out of the ISPS Code, specifically I will analyse the entry into force of treaties and the responsibility and liability of States arising for wrongful acts. At the national level, I will provide a brief overview of the unilateral measures taken by the United States to secure its ports and coastal areas.

1.3. Legal references

The main legal references considered during the research are:

1. International Convention for the Safety of Live at Sea, 1974 and its Protocol of 1988: articles, annexes and certificates.
2. The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988.
3. The International Law Commission's draft articles on Responsibility of States for Internationally Wrongful Acts –August 10, 2001.
4. The Charter of the United Nations.
5. United Nations' Resolutions:
 - A/RES/3034
 - Res. 51/210
 - Supplement #37 (A/59/37)
 - Res.1566 (2004)
 - Res. 1373 (2001)
 - Res. A/59/290
 - Res. A/59/46
6. The Vienna Convention on the Law of Treaties.
7. International Law Commission's draft articles on Responsibility of States for Internationally Wrongful Acts.

2. Background Information

To provide a context for this thesis, it is important to comment on the importance of the shipping industry for the global trade, what it means to the global economy and also discuss the implications of the definition of terrorism, and what is being done by the United Nations to prevent it by adequating the international rules dealing with safety and security issues.

2.1. Importance of the shipping industry for global trade

Shipping is one of the most globalized industries. It involves: the physical movement of raw materials, goods, and passengers in a safe, secure and reliable way from ports of supply to ports of demand; as well as those activities required to support and facilitate such movement.

According to the International Chamber of Shipping, the global shipping industry is responsible for about 90% of global trade¹. The latest figure from the United Nations Conference on Trade and Development -UNCTAD- shows that the shipping industry carried about 24.500 billion ton-miles² in 2003³. According to Alan Branch, shipping “conveys some 99% of the world trade in volume terms and is a major contributor to the creation and development of global wealth”⁴.

Sea transport has been increasingly established as the cheapest and most competitive way of moving large quantities of good over long distances. “With roughly three-quarters of the surface of the earth covered by water, marine transportation has many characteristics that make it the logical choice for the movement of raw materials and finished products required by an expanding world market”⁵.

¹ <http://www.marisec.org/shippingfacts/worldtradeindex.htm> Last visited on 12 July 2005

² A measure of output for freight transportation. The movement of one ton of cargo the distance of one statute mile.

³ UNCTAD. Review of Maritime Transport, 2004. United Nations, New York and Geneva, 2004.

⁴ Branch, Alan E., “Elements of Shipping” 7th Ed. Chapman & Hall. 1996.

⁵ Kendall, Lane C. & Buckley, James J. The Business of Shipping. 7th Ed. Cornell Maritime Press. 2001.

Shipping is considered the main connector of the global economy. Without shipping, intercontinental trade, transportation of raw material and finished goods, the benefits of an economy of scale would not be fully achieved. As a result, the global economy has been able to be knit together by seaborne trade routes as never before.

Trade flows are a good indicator of the interdependencies between regions and a reflection of the economic relationship between industrialized countries and countries with emerging economies. Therefore it is vital to keep the shipping industry competitive and minimize the risks of interruptions that could disrupt the movement of goods.

Adam Smith in 1776, already recognized as the father of the modern economy, considered shipping the cheapest alternative to move good from one place to another. “As by means of water-carriage a more extensive market is opened to every sort of industry than what land-carriage alone can afford it, so it is upon the sea-coast, and along the banks of navigable rivers, that industry of every kind naturally begins to subdivide and improve itself, and it is frequently not till a long time after that those improvements extend themselves to the inland parts of the country. A broad- wheeled waggon, attended by two men, and drawn by eight horses, in about six weeks' time carries and brings back between London and Edinburgh near four ton weight of goods. In about the same time a ship navigated by six or eight men, and sailing between the ports of London and Leith, frequently carries and brings back two hundred ton weight of goods. Six or eight men, therefore, by the help of water-carriage, can carry and bring back in the same time the same quantity of goods between London and Edinburgh, as fifty broad-wheeled waggons, attended by a hundred men, and drawn by four hundred horses.”⁶

The world's fleet is composed of about 50.000 merchant ships, carrying all types of cargo. About half is crude oil and its derivatives products, iron ore, coal, grains, and LNG among other commodities. The other half is general cargo, which includes products like fruits, meats, manufactured goods, chemicals, and raw materials.

⁶ Smith, Adam. “The Wealth of Nations” ((1776)(1983)). Penguin English Library. London.

The world's fleet is registered in over 150 nations and manned by more than a million seafarers. The most important shipping nations by register are Liberia, Panama, Greece, Cyprus, Japan, Bahamas, and Norway.

Shipping is also considered the safest and the least environmentally damaging form of commercial transport and a minor contributor to pollution from its activity due to the number of international agreements regulating its operation. They include agreements dealing with human rights, labour laws, environment and safety regulations, among others.

Felicity Landon published an article where she introduced a theory on how the world tries to keep pace with insatiable consumer demand of finished goods. "World trade is showing spectacular growth and containerised cargoes are stealing the show. Size matters — container ships are getting ever larger and still the talk is of the next step up⁷." According to Landon, the main reason for all this traffic of goods is: "Membership of the World Trade Organisation and the massive shift by mainly European and US companies to outsource manufacturing to China are boosting its economy rapidly."⁸

The growing demand for goods in the global trade market has relied heavily on the capacity and flexibility of the shipping industry. Ports are expanding and developing more efficient ways to handle the extra load with the same resources.

One of the most noticeable aspects of trade pattern is the imbalance that occurs between trading partners. This is when a country imports more than what it exports or vice-versa. This means that ships arrive or departs empty, increasing the cost of freight transport. Landon gives an example of this case when she affirms that "For the UK cargo handling is an increasingly one-way business. While imports from China are piling into the likes of Felixstowe, Britain's biggest container port, repositioning the "empties" is another logistical challenge."⁹

⁷ Landon, Felicity. "Lifeblood of Global Economy". Published in The Times. London. September 7, 2004.

⁸ Ibid.

⁹ Ibid.

During the research, I have identified the seven main terrorist threats that the shipping industry is facing today. They are heavily dependant, and include the location of the ship or the port facility:

1. Pilferage
2. Stowaways
3. Drug smuggling
4. Sabotage
5. Piracy
6. Hijacking
7. Terrorism

The last three threats are the most serious, and they can occur anywhere including when the ship is at berth. According to IMO, the threats to shipping industry and port facilities are real, and governments are well aware of this. For instance, given the fact that most of world trade moves in containers, global trade would come to a halt if only one of these containers is used to smuggle a weapon of mass destruction.

Since most of the world's trade is moved by sea, and it concentrates in just a few ports, the effect of a major economic disruption following a terrorist attack on the maritime transport could be foreseen before it actually happens and that is why it is key to prevent these kinds of attacks.

Being immersed in a growing process of interdependence of all the actors of the global economy, transportation chains –which include air, road and rail transportation- represent a difficulty for national and international controls in regard to the evaluation of risks, prevention and protection against a threat of all the activities that take place along the chain of global trade.

2.2. An approach to the definition of Terrorism
Many terrorist events have taken place around the world, since the 1960s. In 1972, for the first time, terrorism was included in the agenda of the 27th session of the General Assembly of the United Nations¹⁰. At that session the Assembly decided to

¹⁰ A/RES/3034 of 18 December, 1972.

establish the Ad-Hoc Committee on International Terrorism consisting of 35 members.

Terrorism has been in the news everyday, especially after the 1998 bombing of two American embassies in Africa, including the attacks against the United States in September 2001 and in last July with the bombing of London's transportation system. These events have shown that countries are not immune of terrorist activities and threats on their own territory that could prejudicate their economies and quality of life.

In the international field, the term terrorism has been extremely difficult to define, mainly because of political differences as opposed to legal differences.

In 1996, during its 51th session, the United Nations General Assembly through resolution 51/210 established an Ad-Hoc Committee to elaborate an international convention for the suppression of terrorist bombings and subsequently, an international convention for the suppression of acts of nuclear terrorism, to supplement existing international instruments related to the issue, and thereafter to address means of further developing a comprehensive legal framework of conventions dealing with international terrorism.

At present there are 22 global and regional treaties on the subject of international terrorism. The clear normative framework of the United Nations on the State use of force, should be complemented by a normative framework of equal authority on the non-State use of force. The General Assembly of the United Nations, through a working group of the sixth committee, has been discussing the draft of this convention on terrorism. The mandate was given to develop a comprehensive legal framework of conventions dealing with international terrorism, aimed at producing an umbrella convention to complement and not to replace the concrete instruments in force at the time.

Unfortunately, the committee has faced disagreements on various issues, in particular the clear definition of terrorism and the issue of military exclusions, foreign occupation, and State terrorism.

The Ad-Hoc Committee report of 2003 shows no signs of significant progress to resolve the differences among countries. This issue was included in the agenda of the 59th session of the General Assembly of the United Nations in 2004. The negotiations of a comprehensive convention on terrorism will continue this year even though it appears that the outcome will be the same as in the past.

The report of the Secretary General's High Level Panel on Threats, Challenges and Change¹¹ emphasizes the "The United Nations' ability to develop a comprehensive strategy has been constrained by the inability of the Member States to agree on an anti-terrorism convention including a definition of terrorism. This prevents the United Nations from exerting its moral authority and from sending an unequivocal message that terrorism is never an acceptable tactic, even for the most defensible of causes"¹².

The use of force against civilians and the conduct of States in war are regulated by well established norms as the Charter of the United Nations, the Geneva Convention and more recently by the Rome Statute for the International Criminal Court. However the norms to regulate non-State actors are not so well developed.

From the legal view point, the 22 treaties in force have prohibited all forms of terrorism. While the legal framework exists it is dispersed and therefore there is a need to have a comprehensive international convention on this issue. In spite of, the wide array of international and regional conventions, the negotiation of a general convention on terrorism has proven to be more political debate than a legal.

The steady increase of terrorist activities in recent years has imposed upon the United Nations the necessity to achieve the same level of norms to regulate the use of force by non-State actors than the system prevailing for States. The process of negotiation

¹¹ United Nations Secretary-General Kofi Annan announced his plans to establish the High-Level Panel on Threats, Challenges and Change in an address to the General Assembly on 23 September 2003.

¹² "A More Secure World: Our Shared Responsibility". Published by the United Nations, 2004

of a new convention has reached a standoff on certain issues, and this situation is undermining the Organization's moral force against terrorism. The achievement of a clear definition of terrorism is therefore a political imperative for the international community.

A report of the Ad Hoc Committee¹³ presented to the General Assembly in June/July 2004, shows that during the debates to draft the convention, one of the key issues has been the need to distinguish between terrorism and the legitimate fight of people for their right to self-determination and called for the formulation of a legal definition of terrorism.

There are three different positions among countries on this relevant issue. To some delegations, the exclusion from the convention the case of civilians fighting in exercise of their rights to self-determination or against foreign occupation will leave them without the protection of the international humanitarian law. For those delegations, these civilians are not considered "terrorists" as long as they exercise that right within the limits prescribed by the international humanitarian law by not targeting or terrorizing other civilians. This is basically the position maintained by the member States of the Organization of the Islamic Conference -OIC, based on the legally binding character of the right to self-determination in accordance with the Charter of the United Nations and the practices of the main bodies of the Organization. In any case the central point here should be that there is nothing that justifies the targeting and killing of civilians.

Other delegations think that these issues do not need to be specifically addressed. According to them, a definition of terrorism should reaffirm that all forms and manifestation of terrorist acts, wherever and by whoever committed, could never be justified. In this school of thought, the exercise of the legitimate rights of the States, peoples and individuals under international law should be excluded from the scope of the convention, to the extent that the exercise of such rights did not target civilians or terrorize them.

A different approach is defended by some delegations that support a preference for an operational definition of terrorism, in view of the ever-changing methods and

¹³ Report of the Ad Hoc Committee established by Res. 51/210 of 17 December 1996. Supplement #37 (A/59/37).

manifestations of terrorism. These delegations expressed that terrorism has to be defined with reference to the act and its consequences, and not by a description of the perpetrators. Also these countries pointed out that a legal definition of terrorist acts should serve a standard to measure the compliance by States with their obligations under international humanitarian law.

In general terms, during the long lasting debates to draft the convention most of the countries think that the comprehensive convention should be regarded as a law enforcement instrument and, therefore, it would constitute an important tool in the fight against terrorism, strengthening and complementing the existing legal framework.

Another important topic included in the debates to draft the convention has been the issue of State-sponsored terrorism, which is considered the most dangerous form of this inhuman activity. Some delegations drew the Committee's attention to the dangers posed by State-sponsored terrorism and referred to the situations in various countries in this connection, in particular in the Middle East.

In October 2004, the Security Council adopted resolution 1566, which takes a further step on the debate at the Ad Hoc Committee by way of numeral 3 of the resolution which could be considered as an operational definition of terrorism.

Numeral 3 is comprehensive and includes: first term the description of criminal acts and the intentions of the perpetrators on the general public, particular persons or populations to compel governments or international organizations to act or abstain of doing any act. Second, relate this acts with the offenses defined in international conventions and protocols relating to terrorism. Third, it clearly states that terrorist acts are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature. Finally the text calls upon all States to prevent such acts and to ensure that such acts are punished by penalties consistent with their grave nature.

The Secretary General's High Level Panel is consistent with the need to achieve a consensus definition on terrorism in the General Assembly. This panel suggests the

inclusion of four elements in the definition: first, recognition that the State use of force against civilians is regulated by the Geneva Conventions and, if of sufficient scale, constitutes a war crime by the persons concerned or a crime against humanity. The second element is the restatement that acts on the 12 preceding anti-terrorist conventions stating what is terrorism and a declaration that it is a crime under international law. Third, a reference to the definitions contained in the 1999 International Convention for the Suppression of the Financing of Terrorism and Security Council resolution 1566. And finally the description of terrorism as “any action, in addition to actions already specified by existing conventions on aspects of terrorism, the Geneva Conventions and Security Council resolution 1566, that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act”.

Most of the terrorist attacks have been targeted toward economic sensible area like the transport sector. The maritime sector has had its share of attacks, the first attack was in October 2000 towards the military vessel USS Cole while at berth in a Yemeni port –military vessels fall outside civilian regulations, but any vessel could be attacked using the same *modus operandi*¹⁴ - and the bombing of the French crude carrier “The Limburg” also in Yemeni waters in October 2002. Some acts of piracy can be confused as terrorist attacks, but the aims of these two attacks were not to steal the cargo but to do harm and make a political statement.

2.3. What is being done to prevent terrorism in the global context
The international community has been working in terrorism prevention longer than one would think. As an example, the issue of terrorist crimes was included in the 6th International Conference for the Unification of Criminal Law, held in Copenhagen in 1935. The League of Nations sponsored in 1934 a Convention for the Prevention and Punishment of Terrorism, but it never entered into force¹⁵. On December 10, 1934 the Council of the League of Nations, decided to establish an expert committee to prepare a draft convention, because it considered that the rules of international law

¹⁴ A small boat loaded with explosives approaches the target and detonates causing damage to the surroundings.

¹⁵ Moreno Quintana, Lucio. “Tratado de Derecho Internacional” Editorial Sudamericana. Buenos Aires. 1962

related to terrorism repression were not concise enough to assure the necessary international cooperation.

In 1936 the Assembly of the League of Nations considered the projects prepared by the committee and observed that the main objectives of the convention should be: the prohibition of any form of preparation or perpetration of terrorist crimes; to cooperate in the prevention of terrorists crimes and to punish the international terrorist crimes¹⁶. Since then, the discussion at the United Nations and regional organizations on this issue has not changed much.

From 1963 the international community has elaborated, under the auspices of the United Nations, and with the participation of all Member States, 22 instruments to prevent and suppress international terrorism. These conventions are punitive in nature and share a common format: define a particular type of terrorist violence as an offence under the convention, require State Parties to the conventions to penalize that activity in their domestic law, identify certain bases for the Parties to establish jurisdiction over the defined offence and create an obligation on the State in which a suspect is found to establish jurisdiction over the convention offence and to refer the offence for prosecution if the offender is not extradited. An example of this principle can be found on the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation which will be addressed later in this report. This element is commonly known as the principle of “*no safe heaven for terrorists*” and it has been stressed by the Security Council in Resolution 1373 as an “*essential anti-terrorism obligation*” of Member States¹⁷.

The nature of terrorism crimes on society and the violation of the most fundamental human right -the right to live, made it necessary that the actions to prevent and combat them be dealt with at the highest level of the international community. Terrorism methods and practices strike the core values and the purposes and principles of the United Nations Charter. Terrorism is a global threat to democracy, to the rule of law and to international peace and security, thus giving the Organization, on a global scale, a role to prepare and implement conventions and protocols to prevent and combat terrorism and to punish the perpetrators.

¹⁶ Oppenheim, L. “Tratado de Derecho Internacional Publico”. Editorial Bosch. Barcelona, 1961.

¹⁷ www.unodc.org/terrorism.html Last visited on 16 August 2005.

Since 1972, States have drafted and ratified, under the auspice of the UN comprehensive set of international conventions to prevent and combat terrorism. The Organization has created also a framework to help Member States to implement the conventions that at present comprises several instances at the Organization.

At the political level the issue of terrorism has been discussed at the General Assembly –GA- and at the Economic and Social Council –ECOSOC- where an important number of resolutions have been adopted. The GA is assisted by the Ad Hoc Committee created by Res.51/210 in 1996. In resolution 59/290 of 13 April 2005, the General Assembly adopted the International Convention for the Suppression of Acts of Nuclear Terrorism. The Convention will open for signature on 14 September 2005. Under the terms of GA resolution 59/46 adopted on December 2004 the Ad Hoc Committee shall, on an expedited basis, continue to elaborate the draft comprehensive convention on international terrorism. This convention is still being negotiated in view of the lack of agreement on the definition of terrorism and other relevant issues.

The United Nations Office on Drugs and Crime -UNODC- has the task of assisting Member States in their struggle against illicit drugs, crime and terrorism. In the Millennium Declaration Member States also resolved to intensify efforts to fight trans-national crime in all its dimensions, to redouble the efforts to implement the commitment to counter the drug problem and to take concerted action against international terrorism.

The UNODC works with Member States to strengthen the rule of law, promote stable and viable criminal justice systems and combat the growing threat of trans-national organized crime through its global programs to prevent corruption, organized crime, trafficking of human beings and its Terrorism Prevention Branch –TBP.

The mandate given to the TBP is to strengthen the international cooperation and technical assistance in promoting the implementation of the universal conventions

and protocols related to terrorism within the framework of the activities of the United Nations Office on Drugs and Crime.

The ECOSOC has a subsidiary body, the UN Commission on Crime Prevention and Criminal Justice; a 40-member panel in charge of formulating international policies and recommending activities in the field of crime control. The Commission formulates draft resolutions for action by the ECOSOC. These resolutions eventually direct the work of the Centre for International Crime Prevention, which has the responsibility to carry out the Commission's decisions. The Commission issues mandates and recommendations to the UNODC and, after approval by the GA, these mandates are carried out by the TBP.

The other important organ of the UN dealing with terrorism is the Security Council - SC- whose primary responsibility, under article 24 of the UN Charter¹⁸, is the maintenance of international peace and security, this is also the stage where the political debate takes a more concrete approach to the problem of terrorism. The SC has also issued a number of resolutions pertaining to terrorism with binding character like for example Resolution 1373. The Security Council is the body of the UN who supervises the enforcement of the resolutions adopted, either, by the GA or by themselves. In case that a Member States does not abide by its ruling, it is up to the Security Council to decide the sanctions against that Member State.

Many of the UN's agencies, like for example IMO, have drawn their own programs of action against terrorism. IMO has also drawn its own legislation on security issues, like the ISPS Code which will be analysed in chapter 4.

¹⁸ Article 24 of the Charter of the United Nations:

1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.
2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.
3. The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration.

IMO has given assistance to a number of countries in the area of security with the objective of upgrading port facilities safety and security. IMO has also held workshops on maritime security with the authorities of most of the coastal States. Another important objective of this program of cooperation focuses on the preservation of the marine environment and safety issues around coastal facilities.

This chapter was written to give a general background on the importance of the shipping industry and also to give a general overview on the issue of terrorism. On the topic of terrorism, the discussion is only limited to the definition of terrorism and to review the most relevant work done by the United Nations. However it was not mentioned at all the work done by regional organizations, like the European Union, the Organization of American States, the OECD- because it would involve a longer analysis that is beyond the scope of this report.

3. International Conventions dealing with safety and security at sea.

Maritime Security is defined by Hawkes¹⁹ as “those measures employed by owners, operators, and administrators of vessels, port facilities, offshore installations, and other marine organizations or establishments to protect against seizure, sabotage, piracy, pilferage, annoyance, or surprise. It can also be considered as embracing all measures taken to prevent hostile interference with lawful operations”. Maritime security can only be achieved thru the full cooperation between the parties involved in the maritime industry –Governments, International Organizations, Shipping Companies, and Costumers.

In addition, the shipping industry must keep in mind that they are highly vulnerable to terrorist attacks or their ships could be used as weapons of mass destruction, since that they transport a range of goods whose origins, description and ownership could be remarkably vague.

Securing the movement of the global trade imposes a great challenge from a security stand point. The first challenge is to provide the persons in charge of security with a timely warning of a possible threat, the second is to neutralize the threat or repel the actual attack and confront the consequences.

To avoid misunderstandings it is important to show the difference between security and safety. Security are the measures taken to protect against people who do harm intentionally and safety are the measures taken to avoid accidents caused by misfortune or negligence.

3.1. The Safety of Life at Sea Convention of 1974

The Safety of Life at Sea Convention of 1974 –SOLAS Convention- is regarded as the most important of all international treaties concerning the safety and security of merchant ships. It is considered as an umbrella convention that regulates all the

¹⁹ Hawkes, Kenneth Gale. “Maritime Security” Cornell Maritime Press. 1989

safety and security aspects of marine navigation. Today, according to IMO, “it has 155 Contracting Governments which together are responsible for more than 98 per cent of the world shipping fleet by tonnage”²⁰.

The main objective of the SOLAS Convention is to specify minimum safety standards for the construction, equipment maintenance, and operation of ships. The Convention calls on Contracting Governments or Flag States to ensure that ships flying their flag comply with the requirements, and also prescribes a number of certificates to prove compliance of the convention. To that end: “Current flag state practice enables vessel registers the freedom to define a regulatory environment in any way they see fit” and “Strong state regulation affects the desirability of the flag state to shipowners. In this market for flags, the profit motive and effective regulation compete, ultimately, to the detriment of the latter”²¹ Provisions also allow Contracting Governments to exercise Port State control by inspecting ships flying the flag of other Contracting States when they have clear grounds for believing that the ship and its equipment does not comply with the requirements of the Convention.

The SOLAS Convention has been updated by two protocols and numerous amendments in order to keep it in line with technological advances and new challenges. Some of these changes reflect a proactive reflection of new technological developments and safety requirements, while others came into existence as a result of reaction to major maritime disasters.

The 1974 SOLAS Convention is the framework for all regulations that deal with the safety and security of life at sea. Its origins can be traced back to the tragedy of “Titanic” in 1912. This tragedy made the maritime community aware of the need to develop safety standards applicable to all passenger ships. This concept has been expanded to include regulations that deal with security issues as well.

SOLAS has evolved over time as shown by the four Conventions, of which their main results are summarised below:

²⁰ http://www.imo.org/Newsroom/mainframe.asp?topic_id=892&doc_id=4714

²¹ Winchester, Nik & Alderton, Tony. “Flag Audit 2003”. Seafarers International Research Centre (SIRC), Cardiff University.

3.1.1. The 1914 SOLAS Convention

It was the first of these conventions and it was adopted on January 20, 1914 as a response to the numerous accidents that led to 700 deaths per year in average in the late 19th and early 20th centuries.

Following a proposal of the British government, a conference was held with the aim of drafting an international regulation for safety of passenger ships. This conference introduced a new set of international regulations dealing with the safety of navigation for all passenger and merchant ships. An important requirement was the installation of radiotelegraphy equipment for ships carrying more than 50 people.

Another important success of this Convention was the establishment of the North Atlantic Ice Patrol. This Convention was supposed to enter into force in July 1915, however World War I broke out and it did not do so, but many of its provisions were adopted by many States on an individual basis.

3.1.2. The 1929 SOLAS Convention

This Convention followed the same format as the previous SOLAS Convention and introduced new regulations as well as the revision of its two annexes. It entered into force in 1933.

3.1.3. The 1948 SOLAS Convention

As the technology in the maritime sector developed further, a new international conference was called. This time the same pattern, as the two previous conventions, was followed but covered a wider range of ships and in deeper details.

Important safety issues such as watertight subdivision in passenger ships, stability standards, maintenance of essential services during emergency and structural fire protection were included in this new Convention.

Specific requirements for cargo ships were used for the first time due to: 1) the growing importance of cargo movement after World War II, mainly because

passenger ships were facing growing competition from aircrafts; 2) Collision regulations were revised; 3) regulations concerning the safety of navigation were updated.

Another important milestone in the maritime sector occurred in 1948. Under the auspice of the United Nations, the International Maritime Consultative Organization – IMCO- was established, the name was changed in 1982 to International Maritime Organization –IMO. It was the first international body that could adopt regulations on all issues related to maritime safety and security. Originally the SOLAS Convention was intended to be updated by periodic amendments, however, in practice it took so long to secure the minimum number of ratification required to bring it into force, that the meeting of the Parties to the Convention did not meet until 1959. At this conference, it was decided that rather than amending the 1948 Convention, it would be better to adopt a completely new instrument.

3.1.4. The 1960 SOLAS Convention

In 1960, delegates from 55 countries attended the first conference to be held by IMCO. The 1960 SOLAS Convention was adopted and entered into force 5 years later. Although 12 years had passed since the previous SOLAS Convention, there was a need to add numerous technical improvements. For example safety measures, which had once applied only to passenger ships, were extended to cargo ships. In the chapter dealing with life saving appliances, provisions were made for the carriage of life rafts.

The 1960 SOLAS Convention also adopted more than 50 resolutions, some of which gave IMCO the task to undertake studies, collect and disseminate information. It was also agreed to keep the 1960 SOLAS Convention updated through adopted amendments. The first sets of amendments were adopted in 1966 and since that date new amendments were introduced regularly.

3.1.5. The 1974 SOLAS Convention

Unfortunately, the efforts to keep the SOLAS Convention in line with technical developments were doomed to failure due to the nature of the amendments procedure adopted at the 1960 Conference. This procedure had been perfectly manageable in the past when the majority of international treaties were ratified by a relatively small number of countries. However during the 1960s the membership of the United Nations and International Organizations were growing rapidly. More and more countries had secured their independence and many of them began to build their merchant fleets.

The number of parties to SOLAS Convention grew steadily and the consequence was that the number of ratifications required to meet the two-third target required in previous conferences to secure the amendments also increased. It became clear that it would take so long for these amendments to become mandatory that they would be out of date by the time they were adopted.

As a result IMCO decided to introduce a new SOLAS Convention which would not only incorporate all the amendments to the 1960 SOLAS Convention so far adopted but would also include a new procedure which would enable future amendments to be brought into force within an acceptable period of time.

The introduction of the "tacit acceptance" procedure in the international instruments under IMCO administration has made the amendment load possible by greatly streamlining the procedures for the newly adopted provisions to enter into force.

The 1974 SOLAS Convention addresses these issues and consists of 12 chapters, and as new regulations or new challenges arise, more chapters can be added to the main convention. These 12 chapters deal with the following topics:

- Chapter I: deals with General Provisions, the most important concerns the surveys required for various types of ships and the issuing of documents signifying that ships meet the requirements of the convention.
- Chapter II: deals with construction guidelines that ensure the ship's stability, machinery and electrical installations.

- Chapter III: sets out the arrangement of life-saving devices, and describes procedures for emergency and routine drills.
- Chapter IV: deals with communications to and from ships.
- Chapter V: states the provisions of operational nature and applied on all voyages. This chapter also includes a general obligation for Contracting Governments to ensure that all ships are sufficiently and efficiently manned from a safety and security point of view.
- Chapter VI: deals with the carriage of grains due to its effect on a ship's stability.
- Chapter VII: deals with the carriage of dangerous goods and prescribes the classification, packing, marking and storage of dangerous substances.
- Chapter VIII: sets out basic requirement for nuclear ships.
- Chapter IX: entitled "Management for the Safe Operation of Ships" which makes mandatory the International Safety Management Code -ISM Code-, which was adopted by IMO in November 1993.
- Chapter X: Safety Measures for High Speed Boats.
- Chapter XI: makes possible for Port State Control Officers to inspect foreign ships for operational requirements stated in Part I "Special Measures to Enhance Safety". Part II of this chapter – "Special Measures to Enhance Security" which makes mandatory the International Code for the Security of Ships and Port Facilities.
- Chapter XII: - Additional safety measures for bulk carriers was adopted in November 1997. It includes structural requirements for new bulk carriers over 150 meters in length built after 1 July 1999.

3.2. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation – The SUA Convention.

The IMO adopted a resolution called "Measures to Prevent Acts of Piracy and Armed Robbery against Ships", following the hijacking²² of the Italian cruise ship "Achille Lauro". In September 1986, the Maritime Safety Committee –MSC- approved "Measures to Prevent Unlawful Acts Against Passengers and Crew onboard Ships",

²² In October 1985 four heavily armed Palestinian terrorist hijacked in the Mediterranean Sea the Italian cruise ship Achille Lauro, carrying more than 400 passengers and crew.

these resolutions were intended for application to passenger ships engaged on international voyages of 24 hours or more and the port facilities that serves them. These were interim measures until the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 1988 -SUA Convention- came into force. This convention was sponsored by the governments of the countries whose citizens were affected in the Achille Lauro incident.

3.2.1. Overview

The SUA Convention is composed of 22 articles and a Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf.

3.2.2. Provisions

The main objective of the Convention is to ensure that Contracting Governments take appropriate actions against persons committing crimes against ships. According to the Convention, an offence is when a person unlawfully and intentionally commits, attempts to commit or threatens to commit the seizure or exercise the control of a ship by force or intimidation and also it is an offence if a person commits an act of violence against other persons on board, destroys or attempts to destroy the ship or maritime navigational facilities.

3.2.3. Applicability

The Convention defines “ship” as any type of vessel that is not permanently attached to the sea bed²³. The Convention applies, according to article 4, if the ship is navigating or schedule to navigate into, thru, or from waters beyond the outer limit of the territorial sea of a single State.

The Convention requires from the Contracting Governments to make the offences punishable by appropriate penalties that take into account the nature of the offences.

²³ Article 1 of the SUA Convention:

For the purposes of this convention, *ship* means a vessel of any type whatsoever not permanently attached to the sea bed, including dynamically supported craft, submersibles, or any other floating craft.

In case of an act of terrorism, and jurisdiction has been established, Contracting Governments are required by article 10 to either prosecute or extradite the offenders according to their national law.

3.2.4. Amendment Procedure

According to article 20 of the SUA Convention, the Secretary General of IMO shall convene a conference of the States Parties for revising or amending, at the request of one third of the State Parties or ten State Parties, whichever is greater. Actually there are 180 members to the Convention.

This section of the report deals with the two most important international agreements dealing with safety and security at sea: The SOLAS Convention and the SUA Convention. The SOLAS Convention, as mentioned before, sets the safety and security standards needed for a safe and secure journey and it also is a clear example of how international law develops sets of rules with a transnational scope for a number of daily activities. The SUA Convention was born after a sad incident that shocked the international community. Which made clear the need for a convention that would target the persons committing the offence rather than the act itself.

4. Chapter XI-2 of the SOLAS Convention 1974 “Special Measures to Enhance Maritime Security”

All operators of ships and port facilities have the need and the duty to know and understand the security threats that their facility faces. In order to successfully operate on these days of uncertainty, operators must be able to recognize possible obstacles on their journey and have a designated security plan to confront these obstacles in case that they are encountered.

4.1. Background Information

After the terrorist attacks of 11 September 2001 upon the United States, the 76th session of the MSC and the Safety of Life at Sea Conference addressed many maritime security issues that had arisen in consequence of the attacks. On 12 December 2002, following a diplomatic conference, a series of measures were adopted in order to strengthen maritime security and to prevent and suppress acts of terrorism against the shipping industry.

The Conference adopted the following amendments to the 1974 SOLAS Convention in order to enhance maritime security on board ships and at ship/port interface:

1. The acceleration of implementation dates for Automatic Identification Systems -AIS- in the revised Chapter V.
2. The creation of a new Chapter XI entitled “Special Measures to Enhance Maritime Safety and Security” consisting of two parts- Part 1 on special measures to enhance maritime safety, and Part 2 on special measures to enhance maritime security.
3. The development of the International Code for the Security of Ships and Port Facilities -ISPS Code- to support the new SOLAS Chapter XI-2.

4.2. History and Overview

On 1 July 2004 the International Code for the Security of Ships and Port Facilities - ISPS Code- came into force. Its aim is to establish an international framework involving co-operation between contracting governments, port facilities and the shipping industries to detect security threats and take preventive measures against threats affecting ships or port facilities used mainly in international trade.

Chapter XI-2 of the SOLAS Convention is composed of 13 regulations and the International Ship and Port Facilities Security Code –ISPS Code. The ISPS Code has mandatory requirements (Part A) and recommended guidance (Part B).

One might wonder why if there is a specific convention that deals with measures to protect ships, crewmembers and port facilities -SUA Convention-, the ISPS Code was funnelled through a convention that deals with safety at sea as the 1974 SOLAS Convention does?

The answer can be found on the way that SUA Convention and SOLAS Convention were drafted. SOLAS Convention, as explained before, contains a “tacit acceptance procedure”, whereas the SUA Convention does not. The issue of security is a rapid changing concept. By the time a convention drafted to fight an issue is ratified and has entered into force, most likely is that it will be outdated due to the lengthy process of accession and ratification by Member States. This was the reason why the 1960 SOLAS Convention failed and needed to be re-written.

Most of the conventions contain principles as to how make changes to the treaty. The fundamental rule that regulates this subject of “amendments to treaties” is that the modification to the treaty is only possible if all the parties to the Convention agree with the changes. Most of the time, the amendment procedure is included into the treaty itself. This process is not an easy task, especially if some parties to the treaty want to keep it the way it is or simply it is not in their political agenda. Therefore, the proponents of new security measures felt that the most expedite way to implement the new security measures was through the SOLAS Convention.

Another important reason was that the main purpose of the SUA Convention is to ensure that appropriate punishment is given to persons committing unlawful acts against ships, crew members or passengers.

4.3. Applicability of the ISPS Code

According to regulation 2 of Chapter XI-2 of the SOLAS Convention and section 3 of the ISPS Code, the Code applies to passenger ships and cargo ships of 500 gross tons or more engaged on international voyages, and port facilities that serve them.

Member Parties are free to decide the extent of application of the Code to port facilities within their territory that are not used primarily by ships engaged on international voyages. The Code does not apply to warships, or ships owned or operated by Contracting Governments on non-commercial services.

An important fact about the Code is that only States who are Contracting Governments to 1974 SOLAS Convention have a legal obligation to comply with the requirements of the ISPS Code and to submit relevant information as required by IMO.

Contracting Governments can enforce chapter XI-2 of the SOLAS Convention to other ships thru national legislation. For example United States' legislation applies the provisions to ships of more than 100 gross tons - chapter XI-2 of the SOLAS Convention is only applicable to ships of 500 gross tons or more- while European legislation applies them to certain domestic shipping services. Even though Part B of the ISPS Code is only recommendatory, "Part B of the ISPS Code was drafted as guidance but legislation in the US and the EU now make all, or parts, of Part B mandatory."²⁴

4.4. Implementation of the ISPS Code

With the ISPS Code in effect, every ship and every port facility that are subject to the ISPS Code, have to follow a system of surveys, verification, certification and control to ensure that their security measures are implemented. These measures prescribed by the 1974 SOLAS Convention Chapter XI and the ISPS Code can be divided into five major categories accordingly. They are:

²⁴ Wall, Frank. "A new Challenge" Maritime Risk International. Page 11. January 2004.

1. Measures to be implemented by Contracting Governments
2. Measures to be implemented by Ships
3. Measures to be implemented by Shipping Companies
4. Measures to be implemented by Port Facilities
5. Certifications and Documentary requirements

4.4.1. Contracting Governments

The principal responsibilities of Contracting Governments under the ISPS Code regulations are to determine and set the security levels and to inform these levels to ships flying its flag, to port facilities in their territory and to foreign flag ships in or about to enter its ports.

Regulation 4 of Chapter XI-2 of SOLAS Convention states that ships that are subject to the ISPS code, be required to operate at a specific security level at all times.

Depending on credible threats to the ship or to the port facility, three different security levels have been established:

1. Security Level 1: **Normal**, the security level at which ships and port facilities should normally operate. The security measures taken at this level are the minimum standard for ships and port facilities.
2. Security Level 2: **Heightened**, this security level applies as long as there is a heightened risk of a security incident.
3. Security Level 3: **Exceptional**, the level applying for the time when there is a probable or imminent threat of a security incident, although it may not be possible to identify the specific target.

The setting of the security level applying at any particular time is normally the responsibility of the Flag Administration for ships and port States administrations for port facilities and ship calling their ports. Section 7 of the ISPS Code indicates the measures that a ship has to take while operating under each security level and section 14 does the same for port facilities.

These security levels create a link, since they trigger the implementation of appropriate security measures for the ship and the port facility. When ships are at a port facility, and that port facility is operating at a higher security level, all ships have to operate at the level that applies to the port facility. If the case is the opposite, that is when a ship is operating at a higher security level than the port facility, an agreement about the security measures around the ship should be reached between the parties. This does not mean that the port facility has to increase the security level.

When a ship is intending to use port facilities, is at a berth, or is in its territorial sea, the Contracting Government has the right, under the provisions of SOLAS Chapter XI-2 regulation 9, to exercise various control and inspections to check compliance with measures. The Convention also allows the request of information beforehand for the purpose of avoiding the need to impose control measures or other actions that may lead to undue delays. The information that a ship is required to provide is:

1. Evidence that possesses a valid security certificate and the name of the issuing authority.
2. The security level at which the ship is currently operating.
3. The security level at which the ship has operated during the last 10 port calls.
4. Any additional measures taken by the ship in any previous port where a ship-to-shore interface was conducted.
5. Appropriate ship security procedures that were maintained during any ship-to-ship activities.
6. Other practical security-related information taking into account the guidance given in Part B of the ISPS Code.

If a port authority has reasons to believe that the security of the ship, or of the port facilities it has called before or has been compromised, the ship might be subject to additional control measures.

The purpose of port state inspections is to detect technical deficiencies or breaches of mandatory safety and security standards that could present a threat to the port facility, other ships in the vicinity or to the environment.

Before 1 July 2004 the Contracting Governments must have increased and upgraded port safety and security procedures according to the ISPS Code. These security assessments had three essential components:

1. Contracting Governments have to identify and evaluate important assets and infrastructures that are critical to the port facility as well as those areas around the port that if attacked, could cause significant loss of life and damage to the ports' facilities or environment.
2. The assessment has to identify the actual threats to those important assets and infrastructure in order to prioritize security measures.
3. The assessment must address vulnerabilities of the ports' facilities by identifying the weakness that might be a likely target, for example, in physical security, communication systems, structural integrity, procedural policies etc.

Once that this evaluation has been carried out, Contracting Governments can evaluate the risks and threats that the port facility faces and take measures to minimize the threats.

Another task imposed by the ISPS Code to Contracting governments is the issuance of the International Ship Security Certificate –ISSC.

Once that all the security surveys have been carried out, an International Ship Security Certificate can be issued to the ship by the National Maritime Authority and has to be kept on board at all times and available for inspection but out of reach from unauthorized persons. This certificate could also be issued by a classification society on behalf of the Flag State.

The MSC²⁵ concluded that an ISSC certificate should be issued only when the ship has an approved ship security plan –this plan will be discussed later- and when the authorities had objective evidence that the ship is operating in accordance with the provisions of the approved plan. Even though that part B of the ISPS Code is not

²⁵ Seventy-seventh session of the Maritime Safety Commission, 28 May to 6 June 2003.

mandatory, the MSC also concluded that in order to be issued an ISSC, the guidance in part B would need to be taken into account.

4.4.2. Ships

Even though the Automatic Identification System²⁶ –AIS– is not a requirement of the ISPS Code it is a requirement of the 1974 SOLAS Convention, it can also be used to monitor the movement of ships that are suspected to present a security risk. Another security measure stated by SOLAS Convention is the requirement that ships be permanently identified by its unique identification number²⁷. This number must be permanently marked on the hull of the ship.

Additionally of these safety and security measures, ships have to comply with the following procedures:

1. **Ship Security Assessment Survey –SSAS:** The SSAS is a difficult task, by the nature of ships they present changing security environments while at the same time they are vulnerable to rely upon other sources of security assistance once they are sailing. Also a SSAS is difficult to perform because the surveyors have to come up with every unimaginable form of attacks. In order to do this, the surveyors have to have a realistic view of the world we live in today. The main objective of a security survey is to identify to the fullest extent the nature and magnitude of all foreseeable security threats to key operations, and the likelihood of their occurrence in order to establish and prioritise security measures. The survey has to be organized in such a way as to allow a complete and accurate analysis of all security weaknesses, this involves an on-scene security survey to identify existing security measures, procedures and operations. Section 8 of the ISPS Code requires that this assessment survey be carried by qualified personnel. Once that this assessment survey has been carried out, a ship security plan is developed.

²⁶ IMO has mandated the use of Automated Identification System (AIS) as part of the carriage requirement for ships in accordance with SOLAS Chapter V, regulation 19

²⁷ SOLAS Convention regulation XI-1/3.

2. **Ship Security Officers -SSO:** Every ship has to have on board a Security Officer appointed by the owner company according to section 12 of the ISPS Code. Among his tasks are to develop, submit for approval, enforce and update the ship security plan. It is very important that this person has direct access to the top management of the shipping company to ensure that important security information is transmitted.

The ship security officer should have adequate knowledge of the following topics:

- a. The ship security plan.
 - b. The layout of the ship.
 - c. Methods of conducting security inspections.
 - d. Techniques used to circumvent security measures.
 - e. Search methods for persons, baggage, cargo, and ship's stores.
 - f. Emergency procedures.
3. **Ship Security Plan -SSP:** Every ship presents different threats, even if they are owned by the same company. The ship security officer should weight and analyse a number of factors in the process of drafting the ship security plan. They are:

- a. Vulnerability to potential hazards - measures to prevent weapons, dangerous substances and devices intended for unlawful uses from being taken on-board the ship-.
- b. Effect of security measures on business, efficiency and operations -the identification of the restricted areas of the ship and measures to prevent access to them-.
- c. Practical limitations imposed by the physical characteristics of the vessel, facility, or installations - procedures for responding to threats or breaches of security, including evacuation of the ship-.
- d. Alternative measures available - procedures for training, drills and exercises associated with the plan; procedures for interacting with port facility security officers.

These factors can vary from one instance to another, as well as any security plan can vary. For instance a vessel's shipping route, ports of call, cargo, and manning vary regularly. Therefore it is advisable that a review of the ship security plan should be conducted in an annual basis.

When the plan has been drafted, it has to be presented to the National Maritime Authority for its approval according to section 9 of the ISPS Code

4. Record Keeping: The ISPS Code requires ships to keep on board the records of the following activities for a period of time set the Flag Administration.

They are:

- a. Training drills and exercises.
- b. Security threats and security incidents.
- c. Breaches of security.
- d. Changes in security level.
- e. Maintenance and testing of any security equipment on board.

4.4.3. Shipping Companies

The main responsibility of a shipping company is that every one of the ships that it operates obtains an International Ship Security Certificate –ISSC- and also to make sure that all the requirements for its ships are met.

4.4.4. Port Facilities

The ISPS Code sets out similar requirements for ports facilities as it does for ships. For port facilities that receive ships coming from abroad are required to carry out the following:

- 1. Port Facility Security Assessment Survey –PFSAS:** Port facilities face the same threats as ships –terrorist attacks, robberies, etc- but the modus operandi is somewhat different. Most ports are surrounded by cities and any person can break easily into the facility, their intention could not be to commit a crime but they jeopardize the security anyways. This security survey is

basically the same as the SSAS, it has to identify the weak points of the port facility, as well as to establish and prioritise security measures following the requirement of section 15 XI-A of the Code. This survey has to be carried out by well-trained personnel and, as pointed out before, have to have a realistic view of today's world.

2. **Port Facility Chief Security Officer -PFSO:** Every port facility has to appoint a chief security officer. This officer has to have the knowledge of the operational facts of the port, the responsibilities of the port security officer include among others:
 - a. Conducting or arranging the initial PFSAP.
 - b. Implementing the plan.
 - c. Encouraging security awareness and vigilance among the employees of the port facility.
 - d. Act as liaison with the SSOs.
3. **Port Facility Security Plan -PFSP:** Since every port facility is different, a PFSP has to be drafted for every port. This plan has to design measures to avoid weapons and dangerous substances from being introduced into the port facility or onboard a ship. It also has to have procedures for responding to a security threats or breaches of security. Security breaches can be avoided, for example, by conducting background checks to potential employees who will be in charge of security or other sensible issues at the port or any person who will have access to the ship during the performance of their jobs. Every security plan has to be approved by the Contracting Government. Section 16 of the ISPS Code lists these and some other specific requirements.

Port facilities are required to report security related information to the Contracting Government, which in turn will draw a list of approved port facilities security plans and then these will be submitted to IMO.

4.4.5. Certifications and Documentary requirements

In addition, the following three requirements are also applicable to the ship and the port facility:

1. Monitoring and controlling access to installations.
2. Monitoring the activities of people and cargo.
3. Ensuring security communications are readily available.

Due to the fact that each ship or each port facility face different risks, the method in which they must comply the specific requirements of this code will be determined and approved by the Maritime Administration or Contracting Government, as the case might be.

4.5. The Cost of Non-Compliance and Enforcement Issues

The cost of non compliance of the ISPS Code is high, if a ship or a port facility do not comply with the code, it will be detrimental to their finances because, in the case of the ship, it would not be able to call in many ports. In the case of a port, no ship would want to call in an unsafe port, even more when the ship has to keep track of the last 10 ports of call. In the case of a State, not enforcing the ISPS Code can represent a breach of international law -this topic about the non-compliance by States will be analyzed in chapter 5.

If a ship does not possess a valid International Ship Security Certificate -ISSC-, that ship may be detained in port until it gets a certificate. The port State has other options available to sanction a ship if it does not have the ISSC certificate, for example, it may refuse the entry of the ship into port until the ship obtains it or the Port Administrator can impose additional surveillance to the ship.

In effect the measures which are in place have been designed in such a way to ensure that those ships which do not have certificates find themselves out of the market. The cost of non-compliance is very high. Nowadays all charter parties include a clause about compliance with the ISPS Code. So it is up to market forces and economic incentives to “enforce” the code, therefore, why would someone hire a vessel knowingly that it would not be able to call in any port?. In regards to the insurance question, a not complying with the code, could invalidate the policy.

Since SOLAS Convention does not allow IMO to impose penalties, it is a responsibility of Contracting Governments to enforce the code. It's for the Governments' own interest to protect their ports from attacks and safeguard their ships while abroad.

In practical terms, the shift of vision in respect to the problem of safety and security, especially in the maritime sector, triggered the development of a wide variety of measures of safety and protection in the technology field as well in the legislative field.

Complying with the ISPS Code has even made into charter parties. For example BIMCO²⁸ has developed the "BIMCO ISPS Clause" for time charter parties²⁹. This clause addresses four important provisions. The first provision requires the owners to provide the charterers documentary evidence of their compliance with the Code and owners will be liable for their failure to comply with the requirement of the Code. The second action says that charterers have the obligation to provide the owners with their details as well as those of sub-charterers. The third provision says that all delays, costs, or expenses arising out or related to security regulations, will be on the charterers account; however the owners are responsible and accountable for all measures taken to comply with the SSP.

The problem with terrorism is that it can strike anywhere and at anytime. Identifying a threat is key to prevent an attack but the ISPS Code does not give a guideline on what represents a threat to the ship or the port facility. So it is left to the captain, to the SSO, or to the PFSO to analyze and decide what represents a credible threat.

In addition to all these security measures adopted, IMO also launched a global program on maritime/port security, so that it might address the related technical assistance need of developing countries enforcing the ISPS Code. According to the

²⁸ BIMCO according to their web page is an industry association that represents shipowners, shipbrokers, agents, and P&I clubs. Its members represent more than 65% of the world's ocean-going dry-cargo and tanker fleet and in some cases 80% of the cargo carrying capacity of specific ship type. www.bimco.dk Last visited on 25 July, 2005.

²⁹ According to the definition in section 321 of the Norwegian Maritime Code: Chartering where the remuneration is calculated per unit of time.

Report of the Secretary General of the UN, “The IMO global programme was essentially a capacity-building one, providing awareness training on threats to shipping and port operations and on the preventive measures that could be put in place immediately.”³⁰

In the opinion of Juan Carlos Willet who is a member of the crew of an oil carrier, the ISPS Code has reached the expectations, however the Code is subject to diverse interpretations, which makes it complex to implement in a uniform manner.

In his opinion, there is a common view that the Code was drafted in a very rushed way and the time given for its implementation was too short. There were more problems with the implementation on port facilities than in ships.

The application of the code is much stricter on oil carriers than on general cargo ships due to the dynamics of their operations. Oil Carriers operate on a higher security level because of the threats that they face and represent at the same time to the environment.

In the case of general cargo ships, some of the requirements of the Code are not followed in order not to interfere with the operations.

The ISPS Code represents, at least in principle, an attempt to internationalise, in a more comprehensive way, the application of common security principles in the shipping industry, based on the concept of prevention.

³⁰ Measures to Eliminate International Terrorism. United Nations General Assembly Document A/57/183

5. Specific Characteristics of the ISPS Code³¹

When elaborating international rules, States act as legislative power, as the executive power because they enforce the law, and as the judicial power as well because they judge the behaviour of States concerning the respect of these rules

The development of rules of international law is of little importance unless it is accompanied by effective means of enforcement, compliance and settlement of disputes. International law is no longer primarily concerned with reparation for injury, but focuses on prevention and control. The preventive approach rather than the punishment approach plays an important role between States, including private persons –legal and naturals.

As it is known, “the international system does not possess a central agency to enforce international law”³². We can identify three reasons why an actor might obey a rule. The first reason is that he fears punishment –coercion. From this point of view, the international system must devote to enforcement and surveillance and runs the risk of non-compliance when the enforcer is not looking. The second reason is that the actor realizes that the rule might benefit him in some way. This view suggests that any rule following by individuals is the result of a calculated assessment of the benefits for compliance versus the drawbacks of non-compliance. The task of the international legislator is to develop benefits of compliance so that States find compliance of the rule the most attracting option. A third reason could be that the actor feels that the rule is legitimate and ought to be obeyed. “Legitimacy-orientated theorists believe that the more an actor perceives a norm to be legitimate, the more likely he is to

³¹ This chapter was based on an interview with Victor Rodriguez Cedeño, who is a member of the International Law Commission of the United Nations, elected for a first term in 1996 and re-elected in 2001 for the current term (2002-2007)

³² Burgstaller, Markus. “Theories of Compliance with International Law” Martinus Nijhoff Publishers. Leiden. 2005.

comply with that norm.”³³. When this is the case, compliance is neither motivated by fear of punishment, nor by self-interest but instead by an integral sense of moral duty.

The attitude towards the ISPS Code can be fit into the second reason because all the parties involved get explicit benefits derived from proper compliance. For example Contracting Governments will get the benefits of establishing their legitimacy in the international arena, or avoiding the risk of facing legal actions for wrongful acts.

Among Port administrators’ benefits could include a safer surrounding and therefore the cargo would be in a better position than in the hands of a competitor that is not in compliance with the Code.

The shipping industry also benefits from compliance due to the fact that companies would not trust their cargo to law breakers and also because their established reputation as law-abiding enterprise would make authorities less likely to run a lengthy inspection on the ship, which involves a loss of time and money, therefore the load gets faster to its destination.

5.1. Entry into force according to the 1960 Vienna Convention on the Law of Treaties

All treaties adopted by States are regulated by the Vienna Convention on the Law of Treaties, which article 26 says that a fundamental obligation of international law is that treaties must be observed and their obligations performed in good faith, it means the customary international rule ruling the Law of Treaties -*Pacta Sunt Servanda*

According to Rodriguez and Betancourt: “the good will of the State is the fundamental issue when it assumes an obligation on its international relations”³⁴. The State assumes international compromises thru the accession to treaties, thru acceptance of consuetudinary law and even assumes compromises thru unilateral behaviour, even though the former is not juridical fact, it produces juridical effects.

³³ *ibid*

³⁴ Rodríguez-Cedeño, Víctor. Betancourt, Milagros. “Temas de Derecho Internacional VII” Italgrafica. Caracas 2004.

Treaties enter into force and produce the effects wanted once that the entire requirements of the treaty have been fulfilled. The moment, in most cases, is the one agreed by the parties, as stated on article 24 of the Vienna Convention³⁵.

Every treaty determines the conditions of entry into force. In the case of bilateral agreements, the treaty will enter into force when States party had expressed their disposition to abide by the treaty.

When dealing with multilateral agreements, the entrance into force is when an agreed number of signatories deposit their ratifications with the depositary of the treaty. Usually that number is 2/3 of the members. However it is a choice of the States to establish the number of ratifications needed for entrance into force. For example, the number of ratifications needed could vary from agreement to agreement depending on the importance of the topic, in some cases could be 2/3, 7/8 of the member parties or in some cases by unanimity.

For example article VIII of SOLAS Convention states that amendments to the chapters -other than chapter I of the Annex- which contain the Convention's technical provisions shall be deemed to have been accepted –legally binding- within two years -or a different period fixed at the time of adoption- unless they are rejected within a specified period by one-third of Contracting Governments or by Contracting Governments whose combined merchant fleets represent not less than 50 per cent of world gross tonnage. The article contains other provisions for entry into force of amendments including the explicit acceptance procedure, but in practice the tacit acceptance procedure described above has proved to be the most rapid and effective

³⁵ Article 24: Entry into force

1. A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree.
2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States.
3. When the consent of a State to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State on that date, unless the treaty otherwise provides.
4. The provisions of a treaty regulating the authentication of its text, the establishment of the consent of States to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.

way of securing the entry into force of amendments to the technical annex. This method of ratifying amendments is the reason why the ISPS Code was not adopted as a single convention.

5.2. Obligations of Behaviour and Obligations of Result

Under the ISPS Code, there are two types of obligations. The first is “Obligation of Behaviour” that obligates the State to behave in a certain way, which in the case of the ISPS Code means that States have to take the appropriate measures to enforce their national and international legislation related to the maintenance of safety and security on their port facilities and on ships flying its flag. To easily understand the concept of obligation of behaviour the example of a doctor could be used, if a doctor follows all the common practices in the medical field, acts with common sense and if the patient dies, he is not responsible for the death because his behaviour was the appropriate. The same applies to States, if regardless of all the security measures taken, there is an attack on its ports facilities or ships flying other flags are damaged on its territory, this State has to show that his behaviour was the correct and no liability, in principle, could fall upon it. If on the other hand the State did not observe the regulations –in this case the ISPS Code- and the result was an attack then the State could be liable. Due diligence principle is the basis of the obligation of a State in this context.

The other type of obligation is “Obligation of Result”. Under this obligation, the State is supposed to show results of their compliance. This kind of obligation can be found in environmental agreements where there are goals to be achieved after a certain period. A good example of obligation of result is the case of an engineer where the design of the building is supposed not to collapse, if it collapses then the engineer is liable for the collapse.

5.3. Is breaching the ISPS Code considered an International Wrongful Act of a State?

The International Law Commission –ILC, was established by the General Assembly in 1947 to promote the progressive development of international law and its codification. The Commission, which meets annually, is composed of 34 members, who are elected by the General Assembly for five-year terms.

The ILC has drafted 59 articles about the Responsibility of States for Internationally Wrongful Acts. These draft articles were handed for consideration to the General Assembly of the United Nations in 2001, and it is waiting to become an international convention if States accepted the content of the draft proposal.

Given the fact that the 1974 SOLAS Convention and the ISPS Code are international agreements signed and ratified by State parties and if its non-compliance results in a terrorist attack, the State of the injured party could seek compensation from the non-complying State. The international responsibility falls on the non-complying State unless he can show that preventive measures were taken and international legislation was observed at all times, following the principle of due diligence.

These draft articles first define an internationally wrongful act of a State “as one or more actions not in conformity, omissions or both of an international agreements or international law regardless of its origin”. The breach of an international obligation consists in the difference between the conduct required of the State by that obligation and the conduct actually adopted by the State.

For a particular conduct to be characterized as an international wrongful act, the act or the behaviour must be attributable to the State under international law and this act or behaviour must constitute a breach of an international agreement or legal obligation in force at the time of the events.

It is important to remember that States act only thru its agent or representative, but under international law States are responsible not only for their actions but also for omissions of their agents.

If the case is that a port facility, acting under the authorization of the Maritime Authority of a given State, does not enforce the ISPS and there is a terrorist event against the port facility or a ship, the State could be liable because the ISPS Code was not followed correctly. This could be considered a clear example of lack of due diligence.

In the international arena, the State where the event took place could have to compensate the injured party; in the national arena, the State could prosecute the persons or entities responsible of breaching the international rule.

Article 4 of the Draft Proposal deals with the conduct of the organs of a State. The Commission considers that the conduct of any State organ shall be considered as an act of that State under international law –the State is responsible for the conduct of its own organs. So any maritime authority, port authority or any other authority in charge of enforcing not only the ISPS Code but any other IMO sponsored code or international agreement falls under this category. This article also says that an organ includes any person or entity which has that status in accordance with the internal law of the State. It does not matter the position that the agent holds in the organ, although lower officials may have a more restricted scope of operation including the ability to take decisions. However any conduct carried out by them in their official capacity is attributable to the State according to article 4.

The conduct of persons or entities exercising elements of governmental authority is dealt in article 5. Article 5 reads: “The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance”. These entities can be, in special cases, private companies experienced in a specific area that have been duly authorized to exercise duties reserved to government authority, and example of this could be a classification society.

In the case of the 1974 SOLAS Convention and specifically the ISPS Code, the people in charge of enforcing the Code are, in most of the cases, the Captain of the ship or the security officers of the port facility, which obviously are part of a private company.

The reason that the ILC included private entities into the draft is because the new trend in national laws, that gives these entities certain attributions that in the past

were reserved to the State. However to be considered as an act of State, the act itself has to be related to a governmental activity and not other private or commercial activity that the company or entity could be engaged. The internal law in question must specifically authorize conduct as involving the exercise of public authority, it is not enough that it permits activity as part of the general regulation of the affairs of the community.

The ILC also considered the situation where the conduct is carried by private people but are directed or controlled by a State. Article 8 of the draft proposal also says that the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct. In article 5 the situation described was the time when the person acted on its own initiative but in article 8 the person acts under the instructions of the State, this might be the case of the members of a classification society where they are allowed to issue certificates of compliance of diverse international safety and security rules, not only IMO agreements but other international agreements. In case of a breach of an international regulation it is necessary to establish a real link between the person or group performing the act and the State.

According to article 12, “there is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin”. For example if a State fails to enforce the ISPS Code or fails on making sure that port administrations and shipping companies are enforcing it and lives and property are lost to an attack on a vessel or to a port facility, this State might be held responsible for it.

There have been a lot of debates about the applicability of international laws to States. On this subject the ILC agreed, on article 13, that an act of State does not constitute a breach of an international law unless the State is bound by the obligation at the time that the act occurs. This means that for responsibility to exist, the breach must occur at a time when the State is party to the convention. At the moment there are 155 member States to SOLAS Convention, so only these 155 member States have

the legal obligation to enforce the ISPS Code and be liable if there is a breach since the moment the State becomes a party to the convention.

It could be said that “ Generally speaking in the second half of the twentieth century domestic systems gradually opened the door to international values and States became increasingly willing to bow to international law. Although each State is free to choose its own mechanism for implementing international rules.”³⁶ A good example of this affirmation is the importance given to the SOLAS Convention by a majority of the States members to IMO.

³⁶ Cassese, Antonio “ International Law” Oxford University Press. New York. 2001.

6. Additional Security Measures

Since September 2001 it was clear that the transportation sector had many security holes and this was not acceptable from a security perspective. To address this issue, the United States' government has created a number of security related agencies and has put them under the supervision of the new Department of Homeland Security. This Department oversees the Coast Guard who enforces all maritime security rules.

In order to address the security of container transport chain, it is required an inter-modal approach integrating measures across the entire chain. This framework exists but they are isolated from one another along the chain. For example the ISPS Code only deals the section between ports. The two innovative new programs which apply to cargo bound to the United States, are analysed in this chapter.

6.1. Container Security Initiative -CSI.

In January 2002, the government of the United States launched a new program called "Container Security Initiative" –CSI. CSI was designed to lower the risk that a weapon of mass destruction made its way into the United States hidden inside a container. This works by developing a bilateral agreement between the United States and other countries to pre-screen high-risk containers bound to the United States in ports of loading.

One of the main objectives of CSI, among others, is to facilitate the process of detection of potential threat as quick as possible. To accomplish these objectives, CSI uses these elements of prevention:

1. Use of intelligence information to identify and select containers that might represent a threat.
2. Monitor containers already targeted.
3. Use of non-intrusive inspectional equipment –X rays- to check the contents of the container.
4. Use of new generation containers that are harder to tamper with.

At the early days of CSI, the Department of Homeland Security identified the first 20 ports that handle almost 70% of the number of containers that reach the United States. American customs officials presented to these 20 ports the possibility of having American inspectors on their ports with the sole objective of inspecting containers bound to the United States.

In June 2003, Tom Ridge, Secretary of Homeland Security, said in a press release that: “The Container Security Initiative has emerged as a formidable tool for protecting us from the threat of terrorism” And he added that “Now that we have almost achieved our goal for CSI at nearly all of the top 20 we will be expanding CSI to other ports that ship substantial amount of cargo to the United States and that have the infrastructure and technology in place to participate in the program.”³⁷

The United States promotes CSI by showing how it represents a good opportunity to upgrade the levels of security of the containers and transportation in general. CSI is a deterrent to terrorist organizations that could seek to target any foreign port because containers that could pose a threat will be thoroughly searched.

Port facilities participating in CSI and complying with the ISPS Code are less likely to be targeted for terrorist activities and therefore will not present a major threat to its surrounding neighbours and to the environment. Other benefits worth mentioning is that these inspections will take place during the time that the container arrives at the port and the time it is loaded into the ship; once the container reaches American territory, its admittance will be more expedite.

However there are some drawbacks associated with CSI that have been identified. For example, the distortion between ports members of the Initiative and those that are not part. A study of the World Trade Organization –WTO- rules should be made to decide if these measures go against trade agreements and introduce additional trade barriers to international trade.

³⁷ U.S. Department of Homeland Security. “Secretary Ridge Announces New Initiative for Port Security”. Office of the Press Secretary. www.tsa.gov/public/display?theme=44&content=090005198002f95c&print=yes . Last visited on 13 July 2005.

The extra-territoriality of CSI –the issue is about the right of the United States to draw an internal legislation that its enforcement goes beyond its territory-. This is one of the main concerns of the many countries involved but it is important to mention that American officers deployed to foreign ports facilities will be working in coordination with host's country officers to target cargo containers that are intended to enter the United States

It is important to comment on the basis of the bilateral agreement that host countries' officers will conduct the search and their American counterparts will observe the procedures. According to the Commissioner of the Bureau of Customs and Border Protection of the United States Rob Bonner "We are in 34 of the largest cargo seaports outside the United States that ship most of the volume cargo to the U.S."³⁸ This statement shows how States and port facilities are cooperating in order to prevent terrorist attacks by means of a bilateral agreement. With these kinds of actions, all the parts involved get the benefits of continuing trading with the biggest market of the planet.

6.2. Customs-Trade Partnership Against Terrorism –CTPAT.
In April 2002, the CSI Initiative expanded to form the Customs-Trade Partnership Against Terrorism –CTPAT. This program is a joint initiative between the government of the United States and businesses designed to strengthen the supply chain's security. This initiative works by joining efforts of importers, carriers, brokers, and warehouse operators in order to prevent any breach of security during the handling process.

CTPAT recognizes that the only way to successfully combat terrorism is thru full cooperation between the parts involved. For the maritime community and specially the shipping industry in order to participate in the program, their security procedures have to be upgraded throughout their facilities, however this requirement overlaps with the requirements given by the ISPS Code. However this program has a broader reach because it targets the whole supply chain.

³⁸ Council on Foreign Relations. "A Conversation with Rob Bonner" January 11, 2005 .
<http://www.cfr.org/publication.html?id=7601> Last visited on 13 July, 2005

The only difference with other security enhancement programs is that this program is voluntary, and it is the second major voluntary security program announced and implemented by the United States after September 11.

In order to participate on this program, participants must sign an agreement that commits them to the following four actions:

1. Conduct a comprehensive self-assessment of supply chain security using the CTPAT security guidelines.
2. Submit a supply chain security profile questionnaire to Customs authorities.
3. Develop and implement a program to enhance security throughout the supply chain.
4. Communicate CTPAT guidelines to other in the supply chain and work towards building the guidelines into relationships with these companies.

This initiative could be considered like an ISPS Code for the entire supply chain because its requirements do not differ from those given by the ISPS Code. For example, CTPAT requires that a comprehensive test of supply chain security using security guidelines developed by Customs authorities and the trade community. CTPAT also recommends the development and implementation of a program to enhance security throughout the supply chain in accordance with the guidelines.

The main benefits that participants of this program get are: a reduction in the number of inspections and therefore a reduced waiting time at ports and access to the CTPAT membership list which include the name of business that follow strictly the security recommendations.

The drawbacks of this voluntary program have to do with the competitive advantage that participants could have over others. Non-participants in this program and as well as CSI face greater scrutiny and delays when shipping to the United States.

These two examples of national safety regulations show how States can not only abide by international rules but also draft internal rules and accommodate both in a cooperative manner.

7. Conclusion

The main findings of this research are that without a clear definition of terrorism, it will be very difficult to draw effective international legislation to fight the issue, for the simple reason that if States can not agree in the definition, how they will agree with the enforcement of the legislation. Unfortunately, the international legislation today attacks only the symptoms, and not the root of the problem.

Once it has been shown the importance of the shipping industry for the global trade, it is imperative to keep it as safe and secure as it is humanly possible.

However, the SOLAS and SUA Conventions demonstrate how States react to tragic events by drafting international legislations in order to prevent them from happening again and also how these international agreements evolve as time passes to serve better their objectives.

In the case of the SOLAS Convention, it shows how international law has been evolving since the beginning of the 20th century and how it has addressed the problems found along the way. The ISPS Code came to provide additional regulations to introduce standarization to a set of security measures which in the past were applied on a highly discretionary manner by most of the ships and port facilities. This complementary set of regulations is now mandatory in the shipping industry.

These conventions reflect the agreement of the international community on acceptable measures necessary to maximize the safety and security of ships, port facilities and persons on board and minimise the cost of losses and damage associated with terrorist attacks.

States also draw internal regulations in parallel with international regulations in order to hold total control over the regulations due to the fact that international regulations

are sanctioned either by unanimity or consensus, and sometimes the result is not always what the States wish.

It can be conclude that the security measures for the shipping industry discussed on this report would meet their objective if, and only if, they are effectively and consistently enforced by the States.

Finally, when dealing with security issues, shipping companies and port facilities are very zealous with the information that they give out to researchers, that is the reason why I focused the work from a theoretical approach rather than a practical approach.

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